

NTSB Order No. EA-3948

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 23rd day of July, 1993

Respondent .

Docket SE-11606

<sup>1</sup>An excerpt of the hearing transcript, containing the initial decision, is attached.

certified flight instructor (CFI) certificate renewal, in violation of section 61.59(a)(1) of the Federal Aviation Regulations (FAR), 14 C.F.R. Part 61.<sup>2</sup>

A copy of respondent's entire airman record was entered into evidence. (Administrator's Exhibit A-3). According to these records, respondent has held a pilot certificate since 1965. In 1969, the Administrator suspended respondent's private pilot certificate for 90 days. In 1972, following his receipt of a commercial pilot certificate (Commercial Certificate No. 1633391), respondent applied for a ground instructor certificate.

On that application, he responded to the following questions, as follows:

M. Have you had an airman certificate denied, suspended, or revoked? "Yes," "'69-90 day-restored."

N. Do you now hold or have you ever held an FAA Pilot Certificate? "Yes."

O. Grade? "Comm"

P. Certificate Number? "1633391"

Q. Date issued? "1-27-72"

In 1973, respondent applied to renew his ground instructor certificate, providing the same responses to the same questions on that application.

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<sup>2</sup>FAR section 61.59(a)(1) provided at the time of the incident as follows:

"§ 61.59 Falsification, reproduction, or alteration of applications, certificates, logbooks, reports, or records.

(a) No person may make or cause to be made-

(1) Any fraudulent or intentionally false statement on any application for a certificate, rating, or duplicate thereof, issued under this part...."

Also in 1973, respondent first applied to become a certified flight instructor (Certificate Number 1633391CFI, page 52 of Exhibit A-3; the CFI certificate indicates that it is only valid "when accompanied by pilot certificate number 1633391"). On that application (Page 64 of A-3), he responded in like manner to similar questions concerning his enforcement history. Respondent applied to renew his CFI certificate in 1974, 1976, and 1977, and he responded to similar questions with the information concerning his enforcement history. In 1979, 1981, and 1983, respondent again applied for renewal of his CFI, but on a new FAA Form on which question M, concerning an airman's enforcement history, had been deleted.

In 1985, the Administrator issued an order suspending respondent's commercial pilot certificate from December 16, 1985, to July 23, 1986. The order indicated that at the end of the suspension, respondent would have to successfully complete an oral examination and flight test to establish his qualifications to hold a commercial pilot certificate.

On December 11, 1988, respondent filled out FAA Form 8710-1, which superseded the previous forms he had filled out, and which now contained, on the top, a box which respondent checked off indicating that this was an application for "Reinstatement of Flight Instructor Certificate." On that form, respondent replied to the following questions as follows:

M. Do you now hold, or have you ever held an FAA Pilot Certificate, "yes"

If yes, has certificate ever been Suspended or Revoked-"No"

N. Grade - answer omitted.  
O. Certificate Number - "16333391CFI"[sic]  
P. Date Issued - "1-13-83"

On the day of his application, respondent was issued a Temporary Airman Certificate by an FAA-Designated Flight Examiner.

According to the examiner, had respondent indicated that his commercial pilot certificate had been suspended, he could not have issued the Temporary Airman Certificate without at least calling the FAA to verify that respondent was entitled to the certificate.<sup>3</sup>

In February, 1989, the FAA's Airman Records branch notified the local Flight Standards District Office that they questioned the CFI renewal because their records did not indicate that respondent had requalified for his commercial pilot certificate following his suspension.<sup>4</sup> This notice caused an FAA inspector to call and question respondent. Respondent replied to the inspector's questions by insisting that he construed the references in the CFI renewal application to be a request for information concerning his Flight Instructor Certificate, and that he did not intend to conceal information concerning his

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<sup>3</sup>Since respondent's airman records erroneously failed to reflect that his certificate had been restored, the CFI temporary certificate may not have been issued.

<sup>4</sup>Respondent had successfully completed the requirements of his suspension and his pilot certificate was restored to him at some time before his 1988 application for CFI reinstatement, but evidence of this fact was missing from his airman records presumably because of an administrative oversight.

suspension.<sup>5</sup> The inspector determined that respondent, because of his many years of aviation experience and his numerous applications, "should have known" the meaning of the questions on the form. This revocation action ensued.

The law judge found that respondent made a false statement of a material fact, but that he did not commit fraud. In his discussion of the evidence, the law judge indicates that "...I can rather easily understand how someone could make an inadvertent mistake. How someone could misconstrue a particular question. (TR-174)...[but] [t]here is absolutely nothing ambiguous to me in those two questions. I do not see or understand how the Respondent could misconstrue those questions." (TR-175). The law judge notes respondent's "experience, background as a pilot and as a certified flight instructor," and then states that "he did not measure up to that experience when he made out this application on December 11, 1988." (TR-174). The law judge places great reliance in his initial decision on Administrator's Exhibit A-1, a copy of FAA Form 8710-1, dated June 1989, which supersedes the form filled out by respondent, but which was accepted into evidence based on the Administrator's assertion that the form was substantially the same as the one filled out by respondent. The law judge also notes in his analysis that there is no difference between this form and the one respondent filled out, regarding the crucial questions, including "M," "Do you now hold or have you ever held an FAA

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<sup>5</sup>Respondent did not testify at the hearing.

pilot certificate?" Not a certified flight instructor certificate, but a pilot certificate. And the very next question is, "If yes, has that certificate ever been suspended or revoked?"

There is absolutely nothing ambiguous to me in those two questions." (TR-174, 175). While finding that Board precedent requires revocation of respondent's airman certificate, the law judge recommends that the Administrator permit respondent to apply for a pilot certificate in less than a year, stating, "I think the Respondent is deserving of this because he may have misconstrued the question asking him about his prior suspensions." (TR-179).

Respondent asserts on appeal that the evidence fails to establish that he intentionally falsified this application.<sup>6</sup> The Administrator has filed a brief in reply, urging the Board to affirm the revocation order and initial decision.<sup>7</sup> For the reasons that follow, we will remand this proceeding to the law judge for additional findings.

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<sup>6</sup>Respondent also argues that the law judge erred in not dismissing the complaint as stale, since the notice of proposed certificate action was issued more than six months after the Administrator became aware of the alleged violation. Since the order alleged an act of falsification, it presented an issue of lack of qualification. Thus, the law judge's ruling on the stale complaint motion was correct. Administrator v. Potanko, NTSB Order No. EA-3937 (1993).

<sup>7</sup>Respondent's motion to strike the reply brief is frivolous. The Administrator timely filed his reply brief with the Board, but because of a clerical error, addressed the copy sent to respondent's counsel incorrectly. Respondent's counsel admittedly received the reply brief, but not within 30 days after service of the appeal brief. In the Board's view, the requirements of Rule 821.48(d), 49 CFR Part 821, were satisfied by the Administrator.

An intentionally false statement consists of (1) a false statement, (2) made in reference to a material fact, (3) with knowledge of its falsity. Hart v. McLucas, 535 F.2d 516 (9th Cir. 1976). In finding that respondent made an intentionally false statement, the law judge appears to have given great weight to the FAA inspector's opinion that a person with respondent's aviation experience should have known the meaning of the question he answered. However, we ruled in Administrator v. Juliao, NTSB Order No. EA-3087 (1990), that actual knowledge is required to prove an allegation of intentional falsification. We are unable to determine from the initial decision whether the law judge found actual or constructive knowledge here.<sup>8</sup>

Moreover, in discussing whether respondent actually knew the nature of the questions put forth in the application, the law judge refers to the application which superseded the one the Administrator alleges respondent falsified. Thus, when the law judge states that the question asked is about respondent's "pilot certificate" and "not a certified flight instructor certificate," (TR-175), it is unclear whether he is making a credibility determination against respondent, or erroneously relying on irrelevant evidence.

Finally, although the law judge rejected respondent's claim of inadvertence in his discussion of the evidence and appears to have rejected the claim that the question was misconstrued (I.D.

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<sup>8</sup>The law judge's decision makes reference to overruled Board precedent where constructive knowledge of falsity sufficed to establish intentional falsification.

at 175), in his closing remarks the law judge expresses the seemingly inconsistent view that respondent "may have misconstrued" the form. Because the respondent cannot be held to have violated the regulation unless he knew he was answering the question falsely, we must remand the case so that the law judge can clarify his findings.

**ACCORDINGLY, IT IS ORDERED THAT:**

The case is remanded to the law judge.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.